

**Bituma Corporation and International Association  
of Machinists and Aerospace Workers, AFL-  
CIO. Case 18-CA-12467**

June 15, 1994

**DECISION AND ORDER**

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On September 30, 1993, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed limited exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>The Respondent excepts to the judge's finding that employee Lester Olson admitted that his testimony about the July 14, 1992 union meeting was a summary interpretation of Daniel Teynor's more extended remarks. Although Olson did not make this admission, we agree with the judge that the accounts that employees gave Personnel Manager Denning about Teynor's remarks were summary in nature.

<sup>3</sup>In finding that the Respondent violated Sec. 8(a)(1) by determining that Daniel Teynor was ineligible for recall, the judge relied on the Respondent's lack of a good-faith belief that Teynor had maliciously lied about his insurance claim, and on the fact that Teynor's statements were protected. We find it unnecessary to pass on the judge's finding that the Respondent lacked an honest belief that Teynor had maliciously, deliberately, or recklessly lied about his insurance claim. Rather, assuming *arguendo* that the Respondent had such a belief, the General Counsel established that Teynor did not engage in such misconduct. For this reason, and because Teynor's comments about insurance coverage were made in the course of protected activity, we agree that the Respondent unlawfully excluded Teynor from recall. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

In finding that the General Counsel established a *prima facie* case that the Respondent discriminatorily refused to consider Walter DuCharme for recall, the judge relied on antiunion animus the Respondent assertedly exhibited in its decision not to recall Teynor. Because the judge found it unnecessary to decide whether the Respondent's decision to exclude Teynor from recall violated Sec. 8(a)(3), we do not rely on the judge's antiunion animus finding. We agree, however, for the reasons stated by the judge, that the Respondent's proffered reasons for declaring DuCharme ineligible for recall were pretextual. Thus, we infer from all the surrounding circumstances that the Respondent's action was motivated by antiunion animus. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by declaring DuCharme ineligible for recall.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bituma Corporation, Prairie du Chien, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Joseph H. Bornong, Esq.*, for the General Counsel.  
*Robert W. Rasch, Esq. (Subin, Shams, Rosenbluth & Moran)*,  
of Orlando, Florida, for the Respondent.  
*Roger N. Nauyalis*, of Des Plaines, Illinois, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE; RELATED CASES; AND  
CURRENT ISSUES**

TIMOTHY D. NELSON, Administrative Law Judge. On January 23, 1993, after investigating an unfair labor practice charge filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) on November 20, 1992, the Regional Director for Region 18 issued a complaint by the Board's General Counsel against the Respondent (Bituma Corporation), the nominal owner and operator of a plant in Marquette, Iowa.<sup>1</sup> Pursuant to a notice of hearing accompanying the complaint, I heard the case in trial at Prairie du Chien, Wisconsin, on March 23-26, 1993.

Factually, the charge and the complaint focus on events in and around the Marquette plant in late spring to midsummer 1992.<sup>2</sup> During this period, the Union conducted an organizing campaign among the production and maintenance employees at the plant, leading to a Board-sponsored election held on July 16, during a summer layoff period. As of July 16, the Union had received a two-vote majority of the unchallenged ballots (61:59), but 35 challenged ballots—all of them cast by persons laid off on or about May 29—remained uncounted and in need of resolution. In addition, the Respondent had filed objections to the election for various reasons. Following postelection hearings on challenges and objections, a Region 18 hearing officer issued a report recommending that the challenges be sustained,<sup>3</sup> that the Respondent's objections be overruled as meritless, and that the Union be certified based on its July 16 majority showing. On January 5, 1993, in an unpublished decision, the Board adopted the hearing officer's recommendations and certified the Union.<sup>4</sup> The Respondent is currently challenging this cer-

<sup>1</sup>The Union's charge—and the Regional Director's complaint—identified the Respondent as "Gencor Bituma Corporation." At the trial, the parties stipulated, for purposes of this case, that "Bituma Corporation" is the correct corporate styling for the Respondent. The parties also stipulated that Bituma Corporation is a Washington corporation, and is itself wholly owned by Gencor Industries, Inc. based in Orlando, Florida.

<sup>2</sup>All dates below are in 1992 unless I specify otherwise.

<sup>3</sup>The hearing on challenges and objections was conducted on August 11-13. The hearing officer's October 2 report recommended that the challenges be sustained because the record contained insufficient evidence that any of the challengees had a reasonable expectancy of recall when they cast their ballots.

<sup>4</sup>*Gencor Bituma Corp.*, Case 18-RC-15244.

tification in the United States Court of Appeals for the Eighth Circuit by the device of a “technical” refusal to bargain.<sup>5</sup>

In substance, the complaint in this case alleges that the Respondent violated the Act by spying on the Union’s organizing meetings on several occasions between May 29 and July 16, by later “discharg[ing]” three employees then on layoff—Merlin Mabb, Walter DuCharme, and Daniel Teynor—because of their union activities, and by telling one of these employees (Mabb) in or around the second week in June that his involvement with the Union was why he was “being discharged.” The Respondent’s answer admits that this case is properly before the Board,<sup>6</sup> but it denies all such alleged wrongdoing. It admits that it laid off the three alleged discriminatees on or about May 29. In Mabb’s case, it avers that a company agent told Mabb when he was laid off on May 29 that he “would not be eligible for recall.” As to DuCharme and Teynor, the Respondent avers that it “subsequently determined” that those two were “not eligible for recall” either.<sup>7</sup> Finally, the Respondent avers that it took these actions in each case for “legitimate business reasons.” (The Respondent invokes Mabb’s and DuCharme’s allegedly unacceptable previous work histories as the reason it fired them, and justifies Teynor’s discharge on the ground that he made a maliciously false statement about his recent insurance claim in a union meeting held just before the July 16 election, more than a month after he had been laid off.)

In reaching my findings and conclusions below, I have studied the entire record, the briefs filed by the General Counsel and the Respondent, and the legal authorities they have cited. In situations where the facts are in material dispute, I have considered the demeanor of the disputing witnesses, and have tested their competing versions against my assessment of the probabilities inhering in the undisputed surrounding circumstances. In the end, based on my findings and reasoning below, I will conclude that the Respondent violated Section 8(a)(1) by discharging Teynor, and violated Section 8(a)(3) and (1) by firing DuCharme, but did not commit any of the other violations alleged in the complaint.

<sup>5</sup> Following the Board’s certification of the Union in the representation case, the Respondent refused to recognize or bargain collectively with the Union. On April 8, 1993, the Board granted summary judgment for the General Counsel in an 8(a)(5) prosecution over the Respondent’s refusals. *Gencor Bituma Corp.*, 310 NLRB No. 167 (not printed in Board volumes). In his brief, counsel for the General Counsel advises that this “certification-testing” 8(a)(5) case is now pending before the United States Court of Appeals for the Eighth Circuit on the Respondent’s petition for review, filed April 13, 1993, docketed as No. 93–1901.

<sup>6</sup> In this case, as in the related cases noted above, the Respondent admits, and I find, that its operations at Marquette meet pertinent statutory and discretionary tests for the assertion of the Board’s jurisdiction. Moreover, as part of the trial stipulation that the Respondent’s correct name for present purposes is “Bituma Corporation,” the Respondent conceded that service of the charge and the complaint (naming “Gencor Bituma Corporation”) was proper.

<sup>7</sup> The Respondent’s admitted decision to declare each of these three employees “not-eligible-for-recall” was tantamount to firing them, and therefore I will use that term or similar ones below when describing the Respondent’s actions against them.

## FINDINGS AND CONCLUSIONS

### I. BACKGROUND

#### A. Marquette Plant Operations

The Respondent, Bituma Corporation, manufactures portable and stationary asphalt mix plants used by road building contractors. Its manufacturing site is on the outskirts of Marquette, a small, semirural community on Iowa’s eastern border, located directly across the Mississippi River from Prairie du Chien, Wisconsin, itself a small town (population about 6800), but nevertheless the largest urban center within a 50-mile radius of the Marquette plant. Gencor Industries, Inc., the Respondent’s parent corporation, also owns a plant in Orlando, Florida, where it makes at least some of the same asphalt plant components also manufactured at the Marquette plant, and another plant in Youngstown, Ohio, where it fabricates hot oil tanks, which are likewise components used in the finished asphalt plant systems made at Marquette.

The Respondent’s contractor-customers typically place orders in the period October through December, anticipating the coming road construction season. Because of this, the Marquette plant expands its production and maintenance work force in this period, commonly reaching a peak complement of 200 or more by January or February. (In 1992 the complement peaked at about 216 in February.) It lays off many of these workers later in the spring (in 1992 it laid off 89 workers on May 28–29), when most of the orders have been filled. The laid-off workers, residents of Marquette, Prairie du Chien, and other nearby communities, become the main pool from which the plant draws to replenish its complement when new orders begin to arrive in October.

#### B. The Union’s Campaign; Undisputed Areas of Company Knowledge

The Union began its organizational contacts with employees at the Marquette plant on an uncertain date in late April or the first week in May. Alleged discriminatees Mabb, DuCharme, and Teynor were among many workers who attended the Union’s first organizing meeting, held at the Brisbois Lodge in Prairie du Chien, and these three and several others volunteered to become members of the Union’s in-plant organizing committee, a committee that eventually included about 20 employees. Mabb, DuCharme, and Teynor attended additional union meetings held almost weekly during the campaign, all held at another motel in Prairie du Chien, the Best Western-Quiet House (Quiet House).

The Union’s presence was clearly known to the Respondent by no later than on or shortly after May 11, when the Union filed its election petition. The pronoun stance of the three alleged discriminatees was clearly known to the Respondent by no later than July 16. Mabb and DuCharme were admittedly seen by company agents participating in pronoun demonstrations and handbilling efforts at the plant gates on the day of the election. Teynor’s involvement with the Union was clearly known to the Respondent by no later than July 15, when several employees raised questions that day with Personnel Manager Denning concerning certain alleged statements made by Teynor at a union meeting held the previous evening.

### C. Evidence of “Animus” Outside the Limitations Period

Because the Union’s charge in this case was not filed until November 20, any unfair labor practice committed by the Respondent before May 20 would be barred from prosecution by the 6-month limitation rule prescribed in Section 10(b) of the Act. Nevertheless, proof of company statements or conduct betraying antiunion “animus” occurring in the “pre-10(b)” period is commonly received—and was in this case—for its “background” value, because it might illuminate an understanding of the Respondent’s motives in taking the three discharge actions occurring within the 10(b) period which are challenged by the complaint.<sup>8</sup>

It was with the latter announced purpose that the General Counsel invited alleged discriminatee Teynor and another one-time employee, Bradley Winters, to testify concerning pre-May 20 statements allegedly made by two admitted company agents—Personnel Manager Denning in one instance described by Teynor, and Electrical Department Manager Robert McDonald in up to four instances described variously by Teynor and Winters. Denning and McDonald denied having made any of the statements in question. I doubt that it would influence my judgment about the merits of the discharges in this case even if I credited Teynor and Winters over Denning and McDonald. But witness credibility is the threshold issue, and for reasons noted below, I am unpersuaded that either Teynor or Winters offered reliable testimony about the pre-May 22 transactions in question.

#### 1. Denning-Teynor encounter in early April

Teynor sometimes appeared to be venturing beyond what he actually recalled. His testimony seemed especially unsure—and artificially reconstructed—when he purported to describe a conversation about pay rates with Personnel Manager Denning in “early April,” before the Union appeared on the scene. This was a conversation that Teynor says he started after confronting Denning as Denning was walking through Teynor’s work area in the electrical department. This is how Teynor recalled the exchanges that followed: Admittedly “upset,” Teynor opened by complaining about the higher pay being given to a recently hired worker, Nebendahl, and added that “qualified people in the department . . . were at a substantially lower wage . . . and needed to be compensated for their knowledge and experience.” Denning replied that he was “working on it[,] trying to get people higher wages.” Unmollified, Teynor replied, “[W]e as older employees may have to form a union and walk out the door and let him and his new people run the plant for a while.” Denning replied, said Teynor in his first version, that such a walkout “wouldn’t help anything; it would probably just jeopardize your job.” Repeating this story on cross-examination, however, Teynor quoted Denning instead as saying that a walkout “would probably just hinder our job.” But then Teynor hastily added the phrase, “probably make us lose it.” Then, pressed on this, Teynor defensively protested that he could not recall the “exact words” Denning used. Pressed further, Teynor stated finally that his “best recollection” was that Denning had said, “you would probably lose your job.”

<sup>8</sup>See *Joseph’s Landscaping Service*, 154 NLRB 1384 fn. 1 (1965).

Denning testified credibly that in this period he had many conversations with Teynor in which Teynor would complain about low pay.<sup>9</sup> He does not specifically recall Teynor making any reference to employees forming a union, but he insists in any case, that he never made remarks like those described by Teynor about the consequences of an employee walkout. I found Denning’s latter denial demeanorally more convincing than Teynor’s varying assertions. I recognize that variances such as those exhibited by Teynor are not inherently fatal to credibility, and might easily be dismissed as products of mere frailty of memory if displayed by a different witness. But I suspected as I watched Teynor waffle and embellish on the words supposedly used by Denning that Teynor’s difficulties traced from the fact that he had no genuine memory whatsoever of Denning’s reaction, *if any*, to his own supposed threat of a walkout. Indeed, given Teynor’s apparent state of agitation during this encounter, I doubt the reliability of any of his post facto versions of the episode.<sup>10</sup>

#### 2. Various alleged shutdown threats by McDonald

McDonald supervised the electrical work—component wiring, assembly, and installation—done by a number of employees, including Teynor and Winters. He had been on vacation when the Union began its organizing campaign, but admittedly learned of it at an uncertain point after he returned from vacation in early May. By this point, McDonald had already made firm plans to take a new job with a Prairie du Chien company, Design Homes, where he started on June 1. He admittedly participated in several conversations with employees concerning the Union—and his own plans to leave—during his final weeks at the Marquette plant. He testified credibly and without specific contradiction by any prosecution witness that he had no personal stake in the outcome of the union campaign, and that he repeatedly advised workers who brought up the subject with him—Teynor being “primarily” the one who would bring up the issue—that he intended to remain “neutral.”

Teynor described two union related conversations involving himself, McDonald, and other employees, both occurring after May 11, when the Union filed the election petition. In the first one, Teynor said McDonald came into a control van where Teynor was working with another employee, believed

<sup>9</sup>From harmonious elements in the testimony of Teynor’s, Denning’s, and Teynor’s supervisor, McDonald, I find that Teynor had been regularly complaining about low pay in the months before the Union’s arrival to begin organizing. Most of his discussions were with McDonald, who would urge patience, and who assured Teynor that he was himself advocating higher pay for his department’s workers in ongoing discussions with higher level company officials.

<sup>10</sup>Although admitting that he was “upset” during this conversation, Teynor seemed in his descriptions to be downplaying just how upset he really was. Thus, on direct examination, he blandly recalled that at one point he had “asked [Denning] virtually [sic] what it was going to take to get higher wages.” On cross-examination, however, he acknowledged that he had said to Denning, apparently in this same connection, “[I]f it takes having your kneepads wearing thin and having your lips greased exactly right [then] I guess I’ll never get a raise.” As a worker upset enough to say this to the personnel manager, Teynor was probably likewise too upset to pay much attention to what Denning was saying. Moreover, as a witness who edited his testimony on direct examination to delete reference to these vividly memorable remarks, Teynor may be suspected of having tried to shape his testimony for ulterior purposes.

by Teynor to have been Dave Young, who was not called to testify. After a period of work related chit-chat, Teynor states that McDonald mentioned having been in a “conference call” with a “Mr. Elliott” in “Florida,” during which Elliott said that “he would rather close the plant than to let the union organize there.”<sup>11</sup> Teynor recalled that he scoffed at this, and argued that “[i]t doesn’t stand to reason. The man is making money at the facility we are at and it wouldn’t be feasible for him to go and close the plant.” Some days later, Teynor said McDonald entered a control van where Teynor was working with employees Troy Meena, Dave Young, and Brad Winters.<sup>12</sup> Here, Teynor recalls that McDonald again asked some work related questions, but then changed the subject somehow, saying, “We should all think about joining a union quite strongly—or not joining quite strongly—That the repercussions of it could be detrimental.” Then, according to Teynor, McDonald “pointed out a circumstance where Mr. Elliott had bought a plant in I believe it was Youngstown, Ohio that was a unionized plant, and shortly after purchasing that plant he closed the place down and moved the equipment to the Marquette facility. . . . He said he went and broke the union by closing the place down and moving it to Marquette, Iowa.” Teynor said he again argued that it would not “make sense” for Elliott to do this at Marquette, but that McDonald rejoined that “it would not be anything out of the ordinary for him [“Mr. Elliott”] to go and spend ten to 15 million dollars to go and pay off whatever loans he might have against the plant, take the equipment out of here and move it to another place.”<sup>13</sup>

Winters, said by Teynor to have been present during the second episode just described, did not corroborate Teynor, but rather described “a couple of different conversations” with McDonald where he was “sure” Teynor was *not* present. In the first of these, in a control van where Winters and Dave Young were working, Winters recalled that the conversation turned to “rumors” about McDonald’s plans to go to work at Design Homes. McDonald did not then directly confirm that these were his plans, says Winters, but made some statement to the effect that “with the union coming in—his position would be threatened,” and that “he thought it would be a favorable move on his part to do that[,]” i.e., to take the job at Design Homes. Pressed by the General Counsel whether McDonald had more specifically stated what it was that would “threaten” his “position,” Winters then recalled that McDonald had said that “[h]e felt that if the union came that the gates would close.” But Winters immediately volunteered that this may have been “speculation on [McDonald’s] part.” In the second conversation, without remembering the timing or the location, Winters said

that he was alone with McDonald, and asked him what he “really [thought] of this union issue . . . what is going to happen.” To this, McDonald replied, says Winters, that “he thought that it would take Bituma . . . approximately \$10 to 12 million to close down and move, and that if the union was accepted that it [would] cost them more to bring the union in than to close the gates and move it to Florida, or I actually think that Kentucky or Tennessee were also brought into that conversation.” Winters conceded on cross-examination that all of his conversations with McDonald were “friendly” in tone, and that he viewed McDonald’s remarks about the possible consequences of unionization as his own “opinion.” Winters further confirmed that McDonald never claimed to have any “inside information as to what the company in fact would do.”

McDonald’s testimony contradicted Teynor’s at every turn; neither can it easily be harmonized with Winters’ accounts. McDonald emphatically denied having in any way predicted, much less threatened, that the Company would shut down the plant if the Union came in. With equal conviction, he denied that he told Teynor or anyone else that he had been involved in any “conference call” with any member of the “Elliott” family, much less one in which the Union was discussed. Indeed, he testified that he had never been involved in any conference call in that period concerning union related subjects, not with any of the Elliotts nor anyone else.<sup>14</sup> Moreover, he denied making any reference to any closing of the Youngstown plant in any conversation with employees; indeed, he stated that as far as he knew, Gencor was still operating the Youngstown plant, and he had never been given any reason to believe that it had been shut down, much less that it had been closed to avoid a union presence there.<sup>15</sup> McDonald acknowledged, however, that employees would sometimes express anxiety to him about the Company’s possible reaction to the Union’s drive, and would *themselves* voice fears about a possible plant shutdown. But McDonald states that he sought to assuage these concerns by telling employees that his own “personal feeling” was that he “didn’t see how they could . . . close the doors because of the fact that we built so much equipment up here [in Marquette] that they just couldn’t feasibly do down in Florida or anywhere else.” In short, McDonald left the clear impression that he effectively made the same predictions about the *unlikelihood* of a plant shutdown that Teynor claims he made, responding to McDonald’s predictions of a possible shutdown at Marquette.

### 3. Conclusions

I have already explained my reasons for rejecting Teynor’s testimony concerning his encounter with Denning. As to his assertions about McDonald’s statements, Teynor’s demeanor—and the similarly malleable quality of his testimony here—left me dubious of his reliability even before McDon-

<sup>11</sup> The record elsewhere shows that several members of the Elliott family hold top executive positions in Gencor, the Respondent’s parent corporation.

<sup>12</sup> Of these latter, only Winters was called to testify, and as I elaborate below, his testimony does not fit well with Teynor’s version.

<sup>13</sup> Not content with this, counsel for the General Counsel asked Teynor a leading question, “Did he say anything about what he would rather—rather spend the ten to fifteen million dollars than?” Teynor obliged by revising his testimony, now purporting to quote McDonald as saying that “[h]e [Elliott, apparently] would rather spend the ten or fifteen million dollars on moving the place to another locality than to let a union come in.”

<sup>14</sup> McDonald recalled having been involved in “March” in some kind of telephone conference with company representatives in Florida other than the Elliotts. But he was certain that this happened well before the Union came to town, and that this conference dealt with business matters that were entirely unrelated to the Union.

<sup>15</sup> Personnel Manager Denning likewise testified that as far as he knew the Youngstown plant had never been shut down, much less relocated to Marquette, and was indeed still running, continuing to make hot oil tanks used in the Marquette manufacturing operation.

ald came to the witness stand. Moreover, Teynor was never corroborated by other witnesses supposed to have been present, and, indeed, he was implicitly contradicted by Winters on several points. McDonald's denials were uttered with convincing force, and I am more persuaded by his denials than by Teynor's assertions. Winters' recollections were uttered with greater apparent sincerity than Teynor's, but he was again uncorroborated concerning the control van incident, and I remain doubtful about the overall accuracy of Winters' memory, in the light of McDonald's own equally plausible and credibly delivered versions of these events.<sup>16</sup>

With these doubts, I find that the General Counsel has not carried his ultimate burden of persuasion on the question presently at issue: Did either Denning or McDonald say something in the early stages of the Union's campaign that may be taken as establishing that the *Respondent* harbored antiunion "animus?"

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Surveillance of Union Meetings at the Quiet House Motel

#### 1. Introductory summary; the local setting

At the core of the several complaint counts in question is the charge that two conceded agents of the Respondent, General Foreman Duane Prindle and Division Controller Richard Harris, "engaged in surveillance of employees' Union activities." Specifically, the complaint charges that Prindle spied on union meetings at the Quiet House Motel "on a couple of occasions between May 29 . . . and July 16[.]" and that Harris did this once, on "about July 16." Tacked on to these charges are the additional claims that this "surveillance" was (my emphasis), "*part of [the Respondent's] pattern in seeking to gain knowledge of its employees' involvement with the Union, and resulted in the discharges of [Mabb, DuCharme, and Teynor].*" The General Counsel's proof was rather more modest, showing, at most, that Prindle and Harris were each seen *once*—on different occasions—driving *in the vicinity of* the Quiet House while the Union was conducting meetings there.

It helps to understand the local setting a little better: The Quiet House is on the southern outskirts of Prairie du Chien, fronting on U.S. Highway 18. That highway, the main thoroughfare in the immediate region, continues roughly north through Prairie du Chien, and then crosses the Mississippi to Marquette, some 8–10 miles on the far side of Prairie du Chien from the Quiet House. Despite its name, evoking rural tranquillity and solitude, the Quiet House sits within a nearly continuous strip of typical edge-of-town businesses—other motels, fast-food restaurants, auto and farm equipment sales and supply outlets, gas stations, truck stops, and so on. Directly in front of the Quiet House is a parking area for the

motel. Directly across the highway from the Quiet House is a major shopping complex in the area, which is locally called the "Wal-Mart Shopping Center," taking its name from the apparent anchor tenant. The Wal-Mart complex consists of two single-story building wings, arranged together to describe an L-shape, but divided by a drive-through lane at their imagined junction. The Wal-Mart store, a supermarket, and a small bank branch outlet occupy the longest of the two wings, positioned parallel to the highway, but about 300 feet from it. A sandwich shop, a dress shop, a video rental store, and an insurance agency occupy the other wing, which runs perpendicular to the highway, extending toward it from the face of the longer building. All of these businesses are commonly served by a vast parking lot, exceeding 180,000 square feet in area, which fronts on Highway 18.

#### 2. Prindle's circuit of the Wal-Mart lot

DuCharme's testimony concerns a union meeting he attended on an uncertain date, sometime after his May 29 lay-off.<sup>17</sup> The meeting was held in a large room on the second floor of the Quiet House, a room with a window overlooking Highway 18 and the Wal-Mart complex across the highway. DuCharme didn't know when the meeting had started, but "guessed" that he arrived there around 3:30 or 4 p.m., because that was when he "usually" arrived at these meetings. He says he took a seat by the window to provide some distraction, because "[s]ometimes it would get boring" at the meetings. At some point after thus positioning himself, DuCharme says he "glanced" out the window, and then saw General Foreman Prindle enter the Wal-Mart lot, driving his distinctive two-tone pickup, having come up the highway from the north. DuCharme reports that Prindle then drove down a traffic lane through the parking lot towards the Wal-Mart store, then turned left, traversing the store fronts of the long building, then turned left again, back toward Highway 18, driving past the businesses in the shorter building. Without once stopping during this circuit, says DuCharme, Prindle then exited the parking lot, and turned back north on Highway 18, where he had come from initially, passing in front of the Quiet House as he did so. DuCharme recalled further that the Wal-Mart parking lot, which he estimated was capable of holding 500 or more parked cars, was about half full as Prindle made his circuit.<sup>18</sup>

Prindle, who resides on the north side of Prairie du Chien, denied ever being on a spying errand for the company. He stated credibly that he received specific instructions from the

<sup>16</sup>Winters, like McDonald, was no longer working for the Respondent when he testified. He surfaced as a witness for the General Counsel only about a week before the trial, after being contacted by the Union's representative, Nauyalis. His memories of the events occurring almost a year earlier at the plant were clearly impressionistic. Moreover, Winters' testimony, even if credited, would not persuade me that McDonald, in voicing his own personal fears about the consequences of unionization, betrayed "antiunion animus" on the *Respondent's* part.

<sup>17</sup>DuCharme recalled that he attended "numerous" union meetings at the Quiet House during the campaign, perhaps as often as "one a week." He "guessed" that the one in question was "probably in June," but he was so admittedly unsure even of this that the incident he described could as easily have occurred at any time prior to July 14, the last of the Union's meetings before the election.

<sup>18</sup>DuCharme's memory of other salient details is far less certain. At one point, he claimed that he had driven his own pickup truck to the meeting, one that Prindle "would have" recognized, and that he had parked the pickup "in front of" the Quiet House. But DuCharme owns several vehicles, including a Cadillac, and he was not sure when later pressed on these points which one he drove to the particular meeting in question. Similarly, when pressed, he admitted that he had often parked his pickup in the Wal-Mart lot across the highway, and was now unsure where he had parked on the day in question.

Respondent's attorney not to do anything that might be construed as surveillance of union activities. He admittedly visited stores in or around the Wal-Mart complex regularly, as often as four or five times a week for various purposes. He specifically recalled that in the week before July 18, when his summer vacation was to start, he made even more frequent visits, stocking-up at Wal-Mart and the supermarket for a planned fishing trip in Canada with his sons. He could not recall ever having made a circuit of the parking lot at the complex without stopping, but he speculated that if he had ever done so, it might have been to look for one of his sons, or something like that. Possibly suggesting another explanation for what DuCharme claims to have seen, Prindle said that he would sometimes make a circuit of the parking lot to drop off a rented video movie through the door slot at the video store, and when doing so, he would stop in a "fire lane" in front of the store, only for about "10 to 15 seconds," just long enough to run to the storefront and back. He admittedly recognizes one of the vehicles DuCharme drives—a pickup truck—and states that he has seen DuCharme in that truck on many occasions in the Wal-Mart lot, without ever knowing DuCharme's purpose for being there. (DuCharme likewise acknowledged having seen Prindle in the Wal-Mart complex on many other occasions, and concedes that it is a "popular" shopping location for the residents of the area.)

Despite some doubts about how continuously attentive DuCharme may have been while observing Prindle's supposedly unbroken cruise through the Wal-Mart lot, I assume, without deciding, that his account was essentially accurate. The General Counsel reasons that "[i]f DuCharme is credited, the incident he spoke of was not one of [Prindle's] benign trips." Why? The General Counsel cites two circumstances: First, the incident "occurred after 3:30 p.m., when Prindle should normally have been at work." Second, "Prindle did not stop during his circle of the . . . parking lot." As to the first point, Prindle conceded that he supervises the second shift at the plant, which starts at 4:30 p.m., and that he normally arrives for work about 3:30 p.m., because he needs the additional hour before the shift starts to review the status of things with Day-Shift General Foreman Randy Thornton and with the various crew foremen. But the General Counsel's reasoning assumes that Prindle should have been at work on the day and at the time described by DuCharme, an assumption flawed by DuCharme's inability to recall even the day of the week—much less the date or the precise time—when the incident occurred. Therefore, I have no substantial basis for supposing that Prindle "should have" been at work when DuCharme observed him at the Wal-Mart lot.<sup>19</sup> As to the second point, I observe that it is not inherently unusual or suspicious for someone to make a circuit of a large regional shopping center without stopping. Prindle himself offered at least one explanation why he might have done so, and anyone might envision a variety of

equally plausible and innocent explanations for such behavior.

Thus, I conclude that what DuCharme claims he saw is not enough to support even a threshold inference that Prindle was on a surveillance mission for the Respondent. In any case, given the ambiguity of the situation, I have no basis for discrediting Prindle when he insists that he never went to the vicinity of the Quiet House to spy on any union meetings.

### 3. Harris' drive through the Quiet House lot

Teynor's testimony invites roughly similar conclusions. He claims that in a union meeting held at the Quiet House about 2 weeks before the election (i.e., not on or about "July 16," as alleged in the complaint) he found himself positioned near the same window DuCharme had described, which overlooked the Quiet House parking lot in front. Teynor says that he saw a "green Ford" driven by Division Controller Harris (whose face Teynor says was clearly visible from his window perch) enter the Quiet House lot at its south end, even though Harris had approached the lot on Highway 18 from the north. Teynor says he then observed Harris drive the length of the motel parking lot without stopping, then exit on the north end, then proceed back north on Highway 18.

Harris, who resides south of Prairie du Chien, and commutes to work via Highway 18, testified without contradiction that he drives a "gold Mercury" and a "red" Chevrolet S-10, but never a green Ford. I will not dwell on Teynor's apparent misidentification of the vehicle's color and make, because I will assume, without deciding, that Teynor was truthful when he stated that in any case he recognized Harris as the driver.<sup>20</sup> Harris, too, denied ever having been on a spy mission, echoing Prindle in claiming that he was under instructions from company counsel not to do such things. Again, given Teynor's inability to identify the date of the incident, Harris, like Prindle, was hard-pressed to recall what he might have been doing on the day in question. But he said he had no memory of having ever driven into the motel parking lot during the summer of 1992. More generally, however, Harris acknowledged that he is a friend of one of the owners of the Quiet House, a fellow member of the local Rotary Club, and occasionally stops by to chat with him at the motel. Moreover, he said that he is normally the company official who drives out-of-town plant visitors to stay at the Quiet House, or makes lodging arrangements there for them, and on occasion he has visited the motel to make sure that such visitors have arrived.

Here, too, the General Counsel, relying on Teynor's description, argues that "the fact that Harris did not stop belies any innocent explanation for the trip." I am not persuaded. Even assuming the literal accuracy of Teynor's description, I would not infer unlawful motivation on Harris' part merely because he drove through the motel parking lot in the course of reversing highway directions.<sup>21</sup> Neither could Harris be

<sup>19</sup> DuCharme's vagueness leaves open the possibility that the incident occurred on a weekend, or at some time before 3:30 p.m. Confounding the General Counsel's theory further is Prindle's uncontradicted testimony that his normal work schedule usually leaves him with a day off *during* the week, and that, in the week before he left on his vacation trip, he had been given additional "time off" by Plant Manager Conrad Baughman, so that he could run various prevacation errands.

<sup>20</sup> But neither would I embrace the General Counsel's glib attempt on brief to dismiss this misidentification with the statement, "A gold Mercury is not *necessarily that far off* from a green Ford."

<sup>21</sup> In this regard, I again note that the immediate vicinity of the motel was a heavy traffic area, where someone wishing to reverse highway directions—not itself an inherently suspicious thing to do—might find it simplest to do what Teynor claims he saw Harris do.

faulted for not explaining these actions where he seemed genuinely not to recall ever having done any such thing. If his motivation were innocent, it is not surprising that he would not recall such a maneuver. In any case, I again have no basis for discrediting Harris when he stated with apparent sincerity that he did not, in fact, ever drive in the vicinity of the Quiet House for the purpose of surveilling union activities.

#### 4. Conclusions

The General Counsel's evidence, if credited, establishes a coincidence in timing between two of many union meetings at the Quiet House and the brief, drive-by appearance of a company agent during those two meetings. Whether this is to be seen as "mere" coincidence<sup>22</sup> depends largely on one's view of the likelihoods presented by the undisputed surrounding circumstances. Considering the specifics of the local setting, I judge that DuCharme's and Teynor's accounts do not provide grounds for suspecting the company agents' behavior. The record invites endless opportunities for speculation, but nothing substantial enough to create, *prima facie*, the inference that Prindle or Harris were acting as company spies on the days in question. And even if I granted such a threshold inference for argument's sake, I would find that Prindle's and Harris' credible denials adequately rebutted it.

Accordingly, I would dismiss the complaint counts insofar as they allege unlawful surveillance. I would also dismiss the other claims argumentatively inserted in these counts. The General Counsel never introduced any *independent* proof suggesting that Prindle's and Harris' actions formed "part" of some larger "pattern" of "seeking" knowledge of employees' "involvement with the Union."<sup>23</sup> And for reasons that will become more clear in due course, it would involve both undue and entirely unnecessary speculation to suppose that Prindle's and Harris' appearance in the vicinity of the Quiet House "resulted in" the discharges of any of the three alleged discriminatees.

#### B. The Discharges

##### 1. Teynor

##### a. Introduction; immediate background

I address Teynor's discharge first because it is doubly unique among the three terminations challenged by the complaint. First, Denning, the central actor, admittedly had given no thought to declaring Teynor "ineligible for recall" at the time he was laid off.<sup>24</sup> (By contrast, Denning claimed in this

trial he had already decided not to recall Mabb and DuCharme when he laid them off.) Second, the Respondent's defense to Teynor's allegedly unlawful dismissal—that Denning believed that Teynor had made a maliciously false statement about his insurance claim at a union meeting shortly before the election—triggers a quite different legal analysis than the one the Board prescribed in *Wright Line*<sup>25</sup> for more typical cases alleging wrongful discrimination, such as those presented here by the terminations of Mabb and DuCharme.

Teynor admits that he spoke up in the July 14 union meeting to describe problems he had encountered while pursuing an insurance claim. In substance, he testified that all he did was to recount accurately his own experiences, as detailed next, and to urge fellow workers to check to see if they might be having similar problems. Teynor's account is arguably at variance with the testimonial versions offered summarily by two other attendees at the meeting, Lester Olson and Shane Hubanks. However, for reasons explained below, the proper starting point for analysis of the legality of Teynor's discharge is not what Teynor said at the union meeting; rather, our initial inquiry must focus on what Denning claims he *believed* Teynor said. And to understand what Denning might have believed about this requires first a familiarity with the essentially undisputed recent background,<sup>26</sup> known to Denning, relating to Teynor's problems.

Teynor had been enrolled since March in an employer-sponsored health insurance plan with Colonial Life and Casualty Insurance Company. Under the plan, enrolled employees paid the premium through a wage deduction. Respondent's parent, Gencor, had been deducting premium payments from Teynor's and other enrollees' paychecks, and Gencor was supposed to be transmitting these payments to Colonial.<sup>27</sup>

In early April, Teynor's son was injured during a baseball game. Teynor submitted Colonial Life claim forms to the son's treating physician. On May 5, Colonial wrote to Teynor, saying, in pertinent part:

Since your coverage with Colonial is fairly new, we have not yet received your premiums. Please have your bookkeeper attach documentation that deductions have been made and return it to us.

in the week after the election, when he began to formulate "positions" concerning the likely expectancy of recall of each of the 35 challenged voters.

<sup>25</sup> *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), *affg.* *Wright Line* tests.

<sup>26</sup> Teynor's and Denning's essentially harmonious testimony about background matters is a principal source of findings in this section. (As to the number of encounters Denning and Teynor had over the insurance claim, *infra*, I rely on Teynor's more specific memory.) Debby Lessard's testimony and certain exhibits of record contain harmonious supplemental detail. I have also considered Denning's testimony in the postelection hearing insofar as it contains non-hearsay admissions of a party under Fed.R.Evid. 801(d)(2) (D).

<sup>27</sup> Payroll accounting for all of Gencor's operations, including the Marquette plant, was handled by a computer section at Gencor's Orlando headquarters. The deductions were made in Orlando and it was from Orlando that Colonial was to receive premium payments from Gencor for covered employees at all of its plants.

<sup>22</sup> Cf. *Mangurian's, Inc.*, 227 NLRB 113, 114 (1976).

<sup>23</sup> The only other argument made by the General Counsel to support a darker interpretation of Prindle's and Harris' actions is a facially speculative one, that "[s]urveillance would be consistent with the Employer's plans to resist the Union, by unlawful means if necessary." Moreover, this speculation itself is based on a speculative assumption—that the Respondent operated at all times in accordance with supposed overarching "plans to defeat the Union by unlawful means."

<sup>24</sup> In fact, when Denning laid Teynor off for plant work on May 29, he offered Teynor an additional brief stint of jobsite work at a construction project in Montreal, Canada, which Teynor accepted, keeping Teynor employed into the first week of June. Denning further admits that he made the decision not to recall Teynor sometime

The day after he got this letter, Teynor took it to Denning, who said he would take care of it. When Teynor still had not received payment on his claim in approximately the second week of June, he called Colonial and was again told by an agent that Colonial had not received any premium payments. Teynor again went to Denning, who opined that there must be some mistake, but again promised to take care of it. Shortly thereafter, Colonial sent Teynor another copy of the May 5 letter, *supra*, stamped with Colonial's notation, "SECOND REQUEST JUNE 15 1992." On the same day he got this letter, Teynor went to the plant and gave a copy of it to Denning's payroll clerk and assistant, Terry Panka. Denning joined them at this point and took over. In Teynor's presence, Denning placed a phone call to Colonial's agent, and learned that Colonial would begin "processing" Teynor's claim if Denning would fax a copy of Teynor's pay stubs to Colonial, showing that insurance premiums were being deducted. Denning did this. Within 2 weeks, i.e., by the end of June, Teynor finally received and cashed a Colonial check, satisfying his claim.

Denning admittedly knew that Teynor was not the only employee who had gotten "We have not yet received your premiums" letters from Colonial. Apparently in mid-June, Denning had called Colonial's agent about a similar problem with another employee. The Colonial agent told Denning that employees at all three of Gencor's plants had been eligible to "sign-up" during the recent open-season period in March, and that this had resulted in a lot of new enrollees from each of these plants. As Denning recalled it, the Colonial agent went on to explain that:

All those names were entered into one master [list] on the [Orlando headquarters] computer and they weren't differentiated between corporations. So when our employees did call or did send in claims they didn't show up as having coverage or that the premium had been paid.<sup>28</sup>

Also, on July 15, when he fielded a number of employee inquiries apparently stimulated by Teynor's remarks at the union meeting the evening before, Denning learned that employee Kevin Lessard, too, had gotten a "We have not yet received your premiums" letter from Colonial (indeed, a "SECOND REQUEST" letter), which Lessard's wife, Debby, produced on July 15 for Denning's inspection. And once more, Denning was obliged to call Colonial's agent and fax him a copy of Kevin Lessard's pay stubs.<sup>29</sup>

*b. The Respondent's position; unique legal setting; and burdens*

Specifically, the Respondent's position in this case, echoed by Denning's testimony, is that Denning decided to fire Teynor because he honestly believed, based on a flurry of employee questions brought to him on the morning of July 15, that Teynor had falsely told participants in the union meeting that he had not received payment on his claim from

Colonial.<sup>30</sup> Teynor denies having made this statement, and obviously it would not have been a true one, for Teynor admittedly had received the insurance payment in question by the end of June.

The foregoing features establish, *prima facie*, that it was Teynor's supposed misconduct "in the course of" speaking out in a union meeting about an issue of common employee concern—insurance—that caused the Respondent to act against him.<sup>31</sup> And where these facts are established, the employer's claimed motive—good-faith belief of misconduct—is not a perfect defense, even if it is established to the satisfaction of the trier-of-fact. Thus, under the analytical scheme long ago advanced by the Board in *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), and approved by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), the disciplining or discharge of an employee for supposed misconduct "in the course of" engaging in statutorily protected activity will be found to violate Section 8(a)(1), without regard to the honesty of the employer's belief of misconduct, if the General Counsel establishes that the employee "was not, in fact, guilty of that misconduct."<sup>32</sup> As explained by the Court in *Burnup & Sims*, the reason for not giving conclusive weight to the employer's good-faith belief of misconduct in such cases is that "[a] protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."<sup>33</sup>

The allocation of burdens in such cases is likewise prescribed in *Rubin Bros.*, approved in *Burnup & Sims*, and regularly applied in later cases: The General Counsel makes a

<sup>30</sup> On brief, the Respondent makes it clear that its present focus is on Teynor's supposed statement that he had not been paid on his insurance claim. (See R. Br. 39–40, under the heading, "Did Teynor Lie About Not Receiving his Claim Check.") In the postelection proceedings, the Respondent was not quite so narrowly focused. There, elaborating an objection to the election grounded on Teynor's alleged falsehoods at the July 14 meeting, the Respondent averred that Teynor had not only said that his claim had not been paid, but had stated in the same breath that this was "because the company had not been paying the premiums that had been withheld from his pay." And when Denning testified in the postelection hearing, he likewise described having heard reports from employees that Teynor had made the latter claim, as well. In this proceeding, however, Denning denied under examination by the General Counsel that anyone had ever told him that Teynor had stated that the Company had not been making such premium payments. But as I show below, this latter denial is seemingly contradicted by the employees Denning claims to have gotten his information from.

<sup>31</sup> Setting aside the question of Teynor's truthfulness, no one disputes that when Teynor voiced complaints about his insurance experiences to fellow employees in a union meeting, he was engaging in conduct classically protected by Sec. 7 of the Act—"concerted activity . . . for mutual aid and protection." See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563–568 (1978), discussing reach of Sec. 7's "mutual aid and protection" clause.

<sup>32</sup> *Burnup & Sims*, *supra*, 379 U.S. at 23. See also, e.g., *Keco Industries*, 306 NLRB 15, 17 (1992); *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990); and *Wilshire Foam Products*, 282 NLRB 1137, 1157–1158 (1987).

<sup>33</sup> 379 U.S. at 23. See also *Ideal Dyeing*, *supra* at 303, echoing and reaffirming this rationale, and further holding that the Court's reasoning "extends to all cases in which employees are erroneously disciplined or discharged because of alleged misconduct arising out of protected activities that are known to the employer."

<sup>28</sup> These quotes are from the transcript of Denning's testimony in the postelection hearing, at p. 383.

<sup>29</sup> Denning conceded in the postelection hearing that the Lessard claim was not paid by Colonial until August 6. (Hearing Tr. 394: 23–25.)

prima facie showing of unlawful interference with employees' Section 7 rights simply by demonstrating that the employer took action against an employee for behavior occurring in the course of the employee's statutorily protected activity. But this threshold indication of unlawful interference may be rebutted by the employer if it can establish that it acted based on an honest belief that the employee committed "misconduct," i.e., engaged in behavior that is not protected by the Act. And this showing, if made credibly, will be sufficient defense, and will justify dismissal of the complaint, unless the General Counsel, in turn, comes forward with enough evidence to persuade the trier-of-fact that the employer's belief of misconduct was, in fact, a mistaken one.<sup>34</sup>

Applying these principles here, I find that the Respondent's defense as to Teynor carries within it the elements of the General Counsel's prima facie case, and therefore, it fell to the Respondent to establish that it had an honest belief that Teynor engaged in unprotected misconduct. But there is yet one more unique wrinkle to Teynor's situation, one which adds to the Respondent's burden: We are dealing here with the especially sensitive area of employee speech—indeed, speech uttered by an employee to fellow employees within the cloisters of the union meeting hall, virtually on the eve of a critical election. And where employee speech to others is concerned, the Supreme Court has made it clear that even false statements will be covered by the protective mantle of the Act, so long as they bear a reasonable relationship to a current labor controversy, and they are not knowingly false.<sup>35</sup> The Board has been similarly zealous in allowing for wide breathing room for employee speech, recognizing as "well settled . . . that the falsity of a communication does not necessarily deprive it of its protected character."<sup>36</sup> Similarly, the Board has made clear that employee statements evidencing mere "bias or hyperbole" do not lose their protection, not even when such statements are made to "third parties," e.g., to their employer's customers or suppliers or funding sources, and not even when those statements might tend to impair their employer's business reputation.<sup>37</sup> Rather, even in the latter context, where special issues of employee "loyalty" are implicated, so long as the statement relates to a pending labor relations issue, the Board will require that even a false statement be shown to have been "reckless[ly] or maliciously untrue[.]"<sup>38</sup> or "deliberately and maliciously

false,"<sup>39</sup> before it will be found to fall beyond the protection of Section 7.

I take it as axiomatic that an employee's statements to his fellow workers in a union meeting about a subject of common concern on the job—insurance in this case—enjoy at least as much protection as that the Board has accorded to employee communications made to third-parties in the course of a labor dispute. I therefore deem it part of the Respondent's burden to establish not just an honest belief that Teynor made a false statement, but an honest belief that his supposed statement was *deliberately* or *recklessly* or *maliciously* false. For reasons I elaborate next, the Respondent did not persuade me on this level. In the alternative, for the reasons I will discuss thereafter, I would find that Teynor was not, in fact, guilty of the offense that the Respondent fired him for supposedly committing.

### c. Honest belief

This is what the Respondent's evidence shows:<sup>40</sup> Employees Lester Olson and Shane Hubanks were among about 20 employees at the union meeting where Teynor discussed the insurance matter. At the start of the work shift the next morning, July 15, Olson told fellow workers Kim Pickett and Butch Wayne (neither of whom had been at the meeting) that Teynor had said that "they were taking premiums out of his check but he hadn't received any payments on bills that he turned in." (Olson admits that this reflected only his summary interpretation of more extended remarks Teynor had made.) Pickett, also a witness for the Respondent, recalled that Olson told him that "Dan Teynor had made the comment that he had an insurance claim that had not been paid because the company had not paid the premium."<sup>41</sup> Pickett somehow made contact with Denning soon after hearing this news from Olson,<sup>42</sup> and somehow passed on to Denning what Olson had told him about Teynor's remarks.<sup>43</sup> Pickett

<sup>39</sup> See, e.g., *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978), quoting *El Mundo Broadcasting Corp.*, 108 NLRB 1270 (1954):

[It is] immaterial to a determination that an employer has unlawfully discharged an employee for giving currency to inaccurate information . . . that the employer acted upon a good faith belief that the information was deliberately or maliciously false[,] if such were not the case.

<sup>40</sup> Here, my findings blend the testimony of Denning and three employee witnesses called by the Respondent, Lester Olson, Shane Hubanks, and Kim Pickett. Moreover, I have again considered Denning's testimony in the postelection hearing, where he elaborated on certain circumstances which he more summarily referred to in this proceeding.

<sup>41</sup> I note that neither of these summaries is necessarily inconsistent with the reality of Teynor's experience. At most, they suggest that Teynor might have failed to mention the capping episode of that experience—that Teynor finally got paid on his claim.

<sup>42</sup> In the postelection hearing, Denning said that Pickett had called him on the telephone shortly after 7 a.m. In this trial, Pickett recalled that he had gone personally to Denning's office.

<sup>43</sup> In this proceeding, neither Denning nor Pickett identified what it was that Pickett reported to Denning. In the postelection hearing, however, Denning recalled summarily that Pickett had told him that Teynor had said that "Bituma was not paying the premium for the Colonial Life and he had a claim that had not been taken care of yet." On cross-examination in that hearing, however, Denning further admitted that Pickett had told him that "Teynor had said . . . his premiums weren't paid for Colonial Life[.]" and that Pickett had

<sup>34</sup> *Champion International Corp.*, 303 NLRB 102, 108 (1991), citing *Magnolia Manor Nursing Home*, 284 NLRB 825, 829 (1987). By contrast, in cases involving alleged misconduct "wholly disassociated from activities protected by Section 7," the Board seems to accept that the employer's honest belief of such misconduct will perfect a defense, without regard to the accuracy of that belief. *Ideal Dyeing*, supra at fn. 5.

<sup>35</sup> *Old Dominion Branch, Letter Carriers v. Austin*, 418 U.S. 264, 277–778 (1973) (untrue public assertions made in a labor dispute are protected, "even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity"); see also *Linn v. Plant Guard Workers*, 383 U.S. 53, 58 (1966).

<sup>36</sup> *Mitchell Manuals, Inc.*, 280 NLRB 230, 231 (1986). See also *Caterpillar Tractor Co.*, 276 NLRB 1323, 1331 (1985).

<sup>37</sup> See, e.g., *Sacramento Union*, 291 NLRB 540, 547, 549 (1988), enf'd. 889 F.2d 210 (9th Cir. 1989); *Emarco, Inc.*, 284 NLRB 832, 834 (1987); *Allied Aviation Service Co.*, 248 NLRB 229, 230 (1980), enf'd. (mem.) 636 F.2d 1210 (3d Cir. 1980); *Richboro Community Mental Health Hospital*, 242 NLRB 1267, 1268 (1979).

<sup>38</sup> *Emarco*, supra at 834.

further recalled that he asked Denning if “this was true, if the company had been paying the premiums or not.” Denning replied, says Pickett, that he was sure that this was not true, and promised to get a fax from Colonial showing that Teynor’s claim had been paid.

In the next few hours, Denning received similar inquiries from a handful of other employees, including from Hubanks, who was apparently the only one of all who talked to Denning who had actually witnessed Teynor’s statements at the meeting. Denning did not testify as to the specifics of Hubanks’ report, and Hubanks’ testimony contains no clear indication that he even *attempted* to report to Denning what he had heard Teynor say. Rather, Hubanks testified that he simply asked Denning, “[is] the company taking money out of our checks and then not paying the premiums and then our claims [are] not being paid?” And Hubanks recalls that Denning merely replied that he would “check into it.”

At some point while receiving these inquiries, Denning called Colonial’s agent and arranged for him immediately to fax over a copy of Teynor’s canceled claim payment check, as well as a letter certifying that the Company was (in Denning’s words) “in good graces with Colonial.” Denning then made multiple copies of these documents and distributed them to several employees who had inquired earlier that day, asking them to pass on these facts to other employees. Explaining these latter actions, Denning stated in this trial and in the postelection proceedings that the reports he thus received about Teynor’s statements were especially distressing to the Company because such statements would have the foreseeable effect of damaging the Company’s “credibility” at a critical time—shortly before the election. Indeed, on brief, the Respondent’s counsel urges me to find not just that Teynor made the false statement that his claim had not been paid, but that he did so precisely *because* he knew that this would create a “firestorm” of controversy and confusion among the employees who would soon cast their ballots for or against the Union.

I find it hard to square these claims with the available evidence. It is easy to accept that Teynor’s remarks concerning the history of his insurance claim may have created genuine confusion in the minds of some of his listeners, for it was not a simple story, and Teynor was recounting it in a charged, partisan setting, where the Union’s organizer and other employees were likewise speaking and making last-minute exhortations and preparations for the election. But with this in mind, I find it decidedly implausible that the spare information about Teynor’s statements Denning received from employees in summary form on July 15 was enough to cause him to believe, in good faith, that Teynor had falsely claimed that he had *never* been paid on his insurance claim.

Denning was himself familiar with Teynor’s experience, and knew that Teynor’s problems were not isolated ones. Thus, he knew by July 15 that Teynor and Lessard had gotten repeated letters from Colonial stating that Colonial had received no premium payments, and that Teynor’s and Lessard’s claims would not be processed until Colonial got proof that premiums were being deducted from their paychecks. Indeed, Denning knew by July 15, through his earlier

further reported that Teynor *had trouble getting his claims paid.*” (Emphasis added.)

conversations with Colonial’s agent, that Gencor’s Orlando payroll center was at least in part responsible for the snafu that had caused delays in the processing of Teynor’s and others’ claims. Denning knew, too, that he had gotten only the most summary accounts of Teynor’s supposed remarks, mostly from employees who weren’t at the meeting. And strikingly, the only first-hand report he got was from Hubanks, who apparently focused in his inquiry to Denning on the question whether it was true that the company had not been forwarding premium payments to Colonial, after deducting them from workers’ paychecks. This inquiry alone should have put Denning on notice that perhaps Teynor had merely related to other workers, consistent with what Denning already knew to be true, that he had been told by Colonial that his claim could not be *processed* because Colonial had not received premiums on his behalf.<sup>44</sup>

Because of all this, Denning must have recognized the possibility—if not the probability—that the reports he was getting about Teynor’s statements might have traced from a misunderstanding on the reporting employees’ part, and not necessarily from a nakedly false statement by Teynor. Because Denning otherwise struck me as a rational man, I cannot believe him when he claims that, fueled only by these employees’ summary reports, he nevertheless arrived at the conclusion that Teynor must have told a malicious lie. Moreover, it adds to my doubts about Denning’s bona fides that he claims to have reached this conclusion without even troubling, apparently, to press the reporting employees for details regarding Teynor’s statements. I therefore find that Denning did not entertain an honest belief that Teynor had lied, much less maliciously so. And it therefore follows that the Respondent did not meet its burden of coming forward to rebut the General Counsel’s prima facie case.

The inquiry properly ends here with a finding of violation. However, to avoid a time-eating remand should a reviewing body disagree with this rationale, I will make additional findings below about what happened, in fact, at the July 14 union meeting.

<sup>44</sup> This brings me back to the matter of employer “credibility” mentioned by Denning: I find it plausible—but not particularly helpful to the Respondent—that the inquiries Denning received from employees on July 15 were alarming to the Respondent insofar as they reflected that the Company’s “credibility” was being tested at a critical preelection time. However, I must question *which* of Teynor’s reported statements was really more likely to have aroused the Respondent’s concern about its credibility. It is hard to believe that Teynor’s supposed statement that he had not been paid on his claim, in itself, would have caused the Respondent much anxiety from a credibility standpoint, because claim payments were Colonial’s responsibility, not the Respondent’s. It is much easier to believe that the embarrassment to the Respondent’s credibility came from reports that Teynor had said that Colonial wasn’t getting the premium payments that the Respondent had been taking from employees’ paychecks. I think the Respondent’s actions are better understood in the latter light, and so understood, they clearly make the Respondent more legally vulnerable. For if all that were at issue was whether Teynor said that the company wasn’t getting the withheld premium payments to Colonial, this would be a nonissue; such a statement would be, at most, an example of protected “hyperbole,” given the undisputed facts narrated earlier. And I think this latter legal reality explains Denning’s and the Respondent’s strained attempts in *this* trial to rationalize Teynor’s discharge solely in terms of his supposed statement that he had not received payment on his claim.

d. *What did Teynor actually say*

Testifying about his remarks at the meeting, Teynor said that he accurately recapitulated his experiences with his insurance claim from start to finish, including the fact that he finally got paid on his claim. As part of his testimonial version, he recalled that he mentioned the letters he had received from Colonial indicating that his premiums had not been received, even though the Company had been deducting premiums from his paycheck, and then warned his fellow workers that they should check with Colonial to see if they were being credited with premium payments taken from their paychecks.

Viewed uncritically, Olson's and Hubanks' versions could support a finding that Teynor had said *something* leading them to believe that his claim had *never* been paid. But their testimony was again more summary in character than Teynor's, and admittedly reflected their subjective interpretations of Teynor's statements. This summary quality of their testimony cannot be dismissed, contrary to the Respondent's arguments on brief, merely as the products of evaporation of memory over the passage of time. For when Olson testified in the postelection hearing about the same matters, when his memory of events was less than a month old, his account was even more vague and summary in tone. Thus, Olson conceded in the postelection hearing that he had arrived late at the meeting, as Teynor was in the process of recounting his experience with the insurance claim. And Olson could only recall that Teynor had said "Something to the fact [sic] that the *company* hadn't paid an insurance *premium*," and talked about "[s]ome *claims* that hadn't been paid, or *something*." Later, however, he acknowledged that Teynor had mentioned having gotten "a letter from the insurance company that said the *company* did not pay its *premium*." This latter acknowledgment makes me wonder whether Olson had earlier confused the distinct subjects of premium payments and claim payments. And Hubanks, testifying in this trial, seemed to show a similar semantic confusion.

The impressionistic and confused accounts given by Olson and Hubanks are harmonizable with Teynor's own version, especially if one allows for Olson's and Hubanks' seeming difficulty in keeping straight the distinction between premiums not being paid and claims not being paid. In any case, I found Teynor's version the more credibly uttered one, and the more inherently probable one on critical points. Thus, crediting Teynor this far, I find, despite Olson's and Hubanks' possible impressions to the contrary, that Teynor never *explicitly* asserted that his insurance *claim* had not been paid. (At most, there is ground for doubt only about whether Teynor specifically said that his claim *had* been paid eventually, a doubt that is unnecessary to resolve because the *company* has not charged Teynor merely with telling less than the whole truth, but with telling a bald-faced lie.<sup>45</sup>) I

<sup>45</sup> Cf. *Emarco*, supra, 284 NLRB at 532–534. There, the Board accepted that two former strikers awaiting recall had told their employer's general contractor that their employer had been delinquent for 5 or 6 months on its payments into the negotiated health and welfare trust fund, and that this had caused their recent strike. (In fact, the employer had recently become current on those contributions, a main factor in the settling of the strike, although the employees apparently did not mention this to the general contractor.) In addition, the employees had told the general contractor that their employer's presi-

therefore find that Teynor was not, in fact, guilty of doing what the Respondent fired him for having supposedly done. It follows that the Respondent violated Section 8(a)(1) when it discharged him.<sup>46</sup>

2. Mabb and DuCharme

a. *Common features; preliminary discussion*

Unlike Teynor's case, supra, the legality of Mabb's and DuCharme's terminations "turn on" the Respondent's "motivation," and therefore, they must be analyzed within the framework of *Wright Line*, supra.<sup>47</sup> Under that case, the General Counsel's burden is to show that Mabb's and DuCharme's protected activities—here, their support for the Union—was a "motivating factor" in the Respondent's decision to terminate them, and it is only after such a showing is established that the burden shifts to the Respondent to "demonstrate that the same action would have taken place even in the absence of the protected conduct."<sup>48</sup> Mabb's and DuCharme's terminations also share some relevant background facts in common, which I will narrate before turning to the unique details associated with each one:

Most of the 216 employees on hand by February were still at work when the Union filed its election petition on May 11. On May 28–29, the Respondent laid off 89 employees, including Mabb and DuCharme. (These layoff actions are not themselves challenged by the complaint.) Personnel Manager Denning met with the employees targeted for layoff; (usually in small group sessions, but individually in Mabb's case), and gave each a company form "termination report," which Denning had completed and signed. The form contained spaces for an "employee evaluation," but in all 89 cases, these were left blank. The form also contained boxes to check indicating Denning's "recommendation" concerning the "rehire" of the worker in question. In all cases except three irrelevant ones, Denning had checked the "Yes" box next to the question "Rehire?"<sup>49</sup> And in all pertinent cases save Mabb's, Denning had checked the "Without Reserva-

tion" box. Mabb's termination was "without reservation" because he was "a sonofabitch," that "these people never pay their bills," that the company "can't finish the job," and is "no damn good," and that "this job is too damn big for them. . . . It will take a couple of years to finish the job." Id. at 832; see also 834 fn. 14.) The Board found that the employees' remarks were made without malice, noting that the employer's prior history of "chronic" health and welfare payment delinquencies made it reasonable for the employees to question their employer's ability to live up to its financial obligations in the future. Id. at 833–834.

<sup>46</sup> Because it would not affect the remedy or the scope of the remedial Order, I do not decide whether Teynor's discharge constituted an independent violation of Sec. 8(a)(3). *Emarco*, supra, 284 NLRB at 835 fn. 18, citing *Burnup & Sims*, supra, 379 U.S. at 21.

<sup>47</sup> "[W]e shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." 251 NLRB at 1089; emphasis added. See also *Chicago Tribune Co.*, 300 NLRB 1055 fn. 3 (1990), emphasizing the latter passage in holding that the *Wright Line* causation test applies not just to "dual motivation" cases, but to "pretext" cases, as well.

<sup>48</sup> *Wright Line*, supra at 1089.

<sup>49</sup> In the three exceptional cases (employees Moser, Champion, and Rodenberg), Denning had not completed the "Rehire?" portion of the form. He said this was because those employees had in one way or another told him they were not interested in being considered for further work.

tion” box, on the line asking for the degree of conviction with which this rehire recommendation was being made. (On Mabb’s form, Denning had instead checked the “With Some Reservation” box.<sup>50</sup>) Finally, in all cases that concern us, including Mabb’s, the Termination Report Denning gave to the laid off employees contained the following rubber-stamped notation in the space calling for “Additional Comments”:

YOU ARE SUBJECT TO REHIRE UNDER THE FOLLOWING REQUIREMENTS:

- A. *Availability of work.*
- B. Work and safety record meets the approval of the rehire committee.
- C. Employee’s qualifications meet current requirements.

One inference to be drawn from the preceding summary is that, with the possible exception of Mabb, Denning intended to convey to the laid-off employees by these Termination Reports that they would be welcome to return to work when and if plant needs justified it. Consistent with this inference, Denning acknowledged that the plant preferred hiring experienced employees when it came time in the fall and winter to beef up the work force. And he conceded that it was his normal practice to instruct employees being laid off to stay in touch with the Company about their interest in recall. And when he began his annual fall and winter recruitment efforts, he admittedly used a “recall list” drawn up after every spring layoff (containing the names of the recently laid-off workers known to have continuing interest in working at the plant) as “one of the first things I reference.” Thus, we might suppose from the foregoing alone that DuCharme, at least—and possibly Mabb, too—were among the many laid-off workers who could reasonably anticipate being recalled for work at some point in the next seasonal surge in the plant’s complement.

But Denning also testified, in substance, that the termination reports did not necessarily mean what they said; indeed, that he did not necessarily mean what he said when he unreservedly recommended the rehire of all the laid-off employees except Mabb. Thus, speaking in historical generalities, Denning testified that when it came time for spring layoffs, some of the people whom the company had already found to be undesirable workers would nevertheless be given “rehire-without-reservation” recommendations. Denning explained that he did this because he didn’t want to impair their eligibility for unemployment compensation, or their opportunities for work elsewhere. He explained further that it was rare for the Company to fire someone, especially when they were still working, and just as rare for him to advise an undesirable worker even at the time of layoff that he or she would not be recalled. Rather, adopting a phrase suggested earlier by other company witnesses, he said he and the plant supervisors had followed a less “confrontational” . . . philosophy,” meaning, in practice, that even bad workers were allowed to work until the spring layoff, and then were “weeded-out” by the simple devices of laying them off and not recalling them in the future. And Denning also said, consistent with the foregoing, that he “generally” did not

even make a “decision” at layoff time as to the eligibility-for-recall of employees being laid off; rather he said that such decisions would normally be deferred until “recall time,” when, after consulting with supervisors, he could evaluate the suitability for recall of a given worker in the light of plant requirements as they then stood.

It was within this testimonial matrix that Denning explained, finally, that events associated with the July 16 election made it necessary for the first time for him to “confront” the question of certain employees’ eligibility-for-rehire sooner than he might have done in previous years. Thus, as summarized earlier, when 35 of the employees laid off on May 28–29—including Mabb, Du Charne, and Teynor—showed up to vote at the July 16 election, they voted under a challenge, and their ballots were sealed.<sup>51</sup> After the election, but in anticipation of the hearing on challenges and objections held on August 11–13, Denning and the Respondent’s attorneys were required to develop together a series of “positions” concerning the 35 challenges. As summarized by the hearing officer in her October 2 report and recommendations, the Respondent “took no position with respect to whether or not . . . 29 [of the challenged voters] had an expectancy of recall when they cast their challenged ballots.”<sup>52</sup> However, the Respondent contended that the challenges to the ballots cast by Mabb and DuCharme (and three others, Sather, Scherf, and Weisenstein) should be sustained because “their unacceptable work performance disqualified them from recall.”<sup>53</sup> (During the hearing, however, the Respondent changed its position with respect to Scherf and Weisenstein, withdrawing the claim that they were “disqualified for recall,” and instead took a “no-position” position as to their “expectancy of recall.”<sup>54</sup>) The hearing officer found it “unnecessary” to decide the more specific “disqualification-for-recall” questions raised by the Respondent as to Mabb, DuCharme, and Sather (and Teynor) because, as noted earlier, she found ultimately that none of the 35 challenged voters were “given any expectancy of recall” in the period from their layoff to the date they cast ballots under challenge.<sup>55</sup>

It might appear from these descriptions that Denning did not “confront” the question of Mabb’s or DuCharme’s (or Sather’s, or Scherf’s, or Weisenstein’s) eligibility for recall when he laid them off, but did so only after a close election

<sup>51</sup> The challenges were not cast by the Respondent’s election observer; rather, they were leveled by the Board agent conducting the election, because the challengees’ names were not on the employer-furnished voter eligibility list, a list containing only names of workers still on the payroll as of the June 12 “eligibility cutoff” date.

<sup>52</sup> H.O. Report, p. 6.

<sup>53</sup> Id. at 5.

<sup>54</sup> Id. at 6.

<sup>55</sup> Id. at 8 and 10, last sentence. Regarding the “expectancy of recall” issue, it is not within my province to rationalize or harmonize the hearing officer’s findings, made on a different record, with findings I make herein. However, I think it worth noting that the hearing officer’s report, adopted by the Board, used a “reasonable expectancy of employment in the near future” standard in deciding that none of the challenged voters had an expectancy of recall when they cast their ballots. (Id. at 6; my emphasis, cites omitted.) Moreover, the hearing officer noted Plant Manager Baughman’s testimony that, “although the employer has a history of layoffs, this [1992] layoff differed from the others because employees were notified that their layoff was of a permanent nature. (Id. at 4; emphasis added.)

<sup>50</sup> The form also invited a third possible box to check, labeled “Would not Recommend.”

outcome required the Respondent to take a “position” about their eligibility to *vote*. But this is not entirely true, according to Denning. Rather, Denning now says that he had *already* decided when he laid off Mabb and DuCharme that he would not recall them. Obviously, given the history and practices already described, these claims by Denning imply at the least that he acted *unusually* by making such decisions at or before the time of layoff. For the reasons I will lay out in the following sections, I will nevertheless find that Denning, in fact, had determined by May 29 that Mabb would not be recalled, but had not done so in DuCharme’s case.

#### b. Mabb’s discharge

##### (1) Work history; May 29 layoff meeting with Denning

This much is undisputed: Mabb, unlike DuCharme, was in his first season of work at the Marquette plant when he was laid off on May 29. He had started on February 27 and worked continuously thereafter in a second-shift “labor” classification, under the immediate supervision of Foreman Dave Walz, who reported in turn to General Foreman Prindle, who ran the second shift. On May 21, Walz, had completed a “Job Performance Review” on Mabb, which Prindle had countersigned on May 22. The evaluation sheet identified six areas of performance, and invited the rating official to enter a number from 1 to 5—with “1” being the highest rating—in each area. Walz had given Mabb mediocre ratings (a “3”) in five categories, and a “4” when it came to “Dependability.” (According to the evaluation form, a “4” in this instance denoted that Mabb “Needs Close Check for Dependability on Regular Duties—Requires Follow-Up—Requires Some Checking on Quitting Early and Loitering[.]” And in a space for additional narrative remarks on the back of the rating form, Walz had written that Mabb “Requires some follow-up to see if duties are completed correctly. Attendance could be better.”)<sup>56</sup>

On May 29, Denning called Mabb alone into his office to advise him he was being laid off, and gave him the termination report previously described, containing the “Rehire-with-some-reservation” notation. Denning testified that he departed in Mabb’s case from his normal practice of calling employees in groups to receive news of their layoffs because he intended to tell Mabb that he would not be recalled in the future, based on complaints he had earlier received from Walz and Prindle, and especially based on an earlier commitment he had made to Prindle to make it clear to Mabb that he would not be recalled. That such an agreement had been reached between Denning and Prindle before May 29 is well established by the apparently sincere and mutually harmonious testimony of those company agents.

A critical question is whether Denning did what he said he intended to do in his meeting with Mabb—advise Mabb that he would not be recalled. Mabb’s description suggests that Denning made no such statement.<sup>57</sup> But Denning testi-

fied that Mabb asked why Denning had marked the “with some reservation” box, and that he then told Mabb “that he would not be placed on the recall list because of his work abilities here at Bituma.”<sup>58</sup> On this point, I credit Denning, not just because his demeanor impressed me more than Mabb’s, but also because Denning is substantially corroborated by credible testimony from Prindle concerning the relevant background, especially that Prindle had virtually extracted a promise from Denning earlier that Mabb would not be recalled, and that Denning would so advise Mabb at the time of his layoff.<sup>59</sup>

Denning and Prindle denied knowing as of May 29 that Mabb was prounion. Indeed, Mabb himself admitted that he kept his sympathies “confidential” until the day of the election, when he donned a hat and T-shirt with union emblems on them and joined a group of fellow union supporters to distribute handbills outside the plant gates. If it is true that the Company did not know of Mabb’s prounion stance on May 29, then my finding that Denning told Mabb on May 29 that he would not be recalled is virtually dispositive of the merits of the complaint as to Mabb. For it would show that Mabb’s union sympathies or activities could not have been a “motivating factor” in Denning’s decision not to recall Mabb. This analysis might therefore properly close here, were it not for a later incident described by Mabb during which Prindle supposedly confessed that Mabb’s “union involvement” was why he had been discharged.

##### (2) Mabb’s later encounter with Prindle

Mabb and Prindle agree that they had a discussion at the plant on an uncertain date after Mabb’s layoff (in late June or early July, according to Mabb). They agree further that Prindle intercepted Mabb as he was about to enter one of the plant buildings. (Mabb declared vaguely that his purpose was to “visit with” fellow employees; Prindle more specifically recalled that Mabb said he wanted to talk to employee Jeff Harbaugh.) They disagree fundamentally about what happened thereafter.

In Mabb’s first version, he described the ensuing conversation this way: Prindle told him, “You are no longer supposed to be on the property because you was fired.” To this, Mabb replied, “I heard I wasn’t fired. My layoff paper says I was laid off and subject to rehire.” To this, Prindle rejoined, “Well, I heard you was fired and we don’t want you on the property no more because you are union involved.” This gratuitous admission by Prindle ended the exchange, according to Mabb. On cross-examination, however, Mabb implicitly conceded that Prindle had not really declared him

and then simply handed Mabb “a layoff paper,” i.e., his termination report.

<sup>58</sup> Mabb admitted on cross-examination that he had noticed that Denning had checked the “with some reservation” box on his termination report. However, Mabb said that he did not question Denning about this because he “really didn’t understand what it meant.”

<sup>59</sup> Denning claimed that it was a simple “mistake” on his part that he checked the “with some reservation” box on Mabb’s termination report; he said that he had actually intended to check the “would not recommend” box. I find it unnecessary to my analysis to decide whether Denning’s claim of mistake in this respect was truthful. The more important facts as I have found them are that Denning had decided before May 29 not to recall Mabb, and told Mabb on May 29 that he would not be recalled.

<sup>56</sup> Walz did not testify; Prindle’s testimony is that this rating was, if anything, lenient, but that he acquiesced in it because he knew that Mabb was soon to be laid off in any case. Moreover, said Prindle, Denning had promised that he would not recall Mabb after Prindle had complained about him earlier. Denning corroborates this.

<sup>57</sup> According to Mabb’s perfunctory account of the episode, Denning “[j]ust told me it was layoff time and I was laid off[.]”

*persona non grata* on plant “property,” but had merely told him that he could not visit with employees unless they were on their “break time.” This concession was so out of keeping with the tenor of Mabb’s initial account that I began to doubt the reliability of other elements in that account even before Prindle took the stand.<sup>60</sup>

Prindle’s version is that he stopped Mabb, learned that Mabb wanted to talk to employee Harbaugh, then asked Mabb, “Could it wait to another time? . . . we’re during working hours here Merlin, and I would appreciate if you could do it at another time.” Mabb then turned and walked back towards his car, appearing “ticked off” to Prindle. Prindle followed him part of the way, then himself turned away to return to the plant. As he did so, Mabb asked, “Am I going to get called back?” Prindle turned to face Mabb, and said, “No,” and then returned to a plant building. Prindle denied having mentioned anything to Mabb about “union activity,” and stated that he was unaware at that time that Mabb was involved in any union activity. But he says he was “surprised” enough by Mabb’s query (“Am I going to get called back?”) that he confronted Denning the “very next night” and asked him if he had told Mabb that “he wasn’t going to be invited back here.” In this meeting, as Prindle and Denning harmoniously recalled it, Denning assured Prindle that he had given that message to Mabb on the day he laid him off.

I found Prindle more demeanorally impressive than Mabb, and his account of the episode seemed more inherently probable than Mabb’s. (Where Mabb admittedly had kept his own union affiliation a secret until he joined a prounion handbilling effort outside the plant on July 16, it seems circumstantially unlikely that Prindle would have had any reason to make any reference to Mabb’s union involvement on the day in question, which Mabb conceded fell well before he publicly surfaced as a union supporter.) Therefore, I find that Prindle made no mention of Mabb’s supposed union involvement during this encounter.

### Conclusions

It is axiomatic that an employee’s union activities and sympathies could not have been a “motivating factor” in an employer’s decision to discipline or discharge him or her where the employer did not know of the employee’s prounion stance at the time it took action against the employee. And proving the existence of such knowledge is part of the General Counsel’s traditional *prima facie* burden.<sup>61</sup> Here, ignoring Mabb’s discredited testimony about his postlayoff encounter with Prindle, the record affirmatively suggests that the Respondent did *not* know of Mabb’s prounion role when Denning told him at layoff that he would not be recalled.

Concededly, however, these suggestions would not be conclusive on the point if the “circumstances” otherwise tended to support an inference that Mabb’s prounion role was

known to the company by May 29.<sup>62</sup> And one circumstance sometimes cited by the Board as tending to establish the requisite knowledge is the employer’s proffering of clearly pretextual reasons for having acted against a prounion employee shortly after more general knowledge of union activities had been acquired by the employer.<sup>63</sup> It is apparently with this in mind that the General Counsel argues that the reasons invoked by Denning and Prindle for agreeing, before May 29, not to recall Mabb were merely pretextual. I don’t find it necessary to explore these reasons; it suffices for me to find, contrary to the General Counsel, that the reasons given by Denning were substantially and credibly supported by Prindle’s testimony, and even by the “lenient” (but nevertheless unflattering) evaluation that Foreman Walz wrote concerning Mabb on May 21. Moreover, the General Counsel did not seek in any way to rebut the reasons cited by Prindle or Denning for arriving at the conclusion that Mabb should not be recalled. In these circumstances, I find that the reasons cited by Prindle were not merely pretextual, and therefore they cannot be invoked to supply the otherwise missing *prima facie* element of knowledge.

Accordingly, without a credible showing by the General Counsel that the Respondent knew of Mabb’s prounion role as of May 29, the complaint as to Mabb is doomed, and I will recommend dismissing it without further examination into the underlying reasons advanced by the Respondent for declaring Mabb ineligible for recall.

### c. DuCharme’s discharge

DuCharme’s situation invites the same kind of analysis used in Mabb’s case, but for the reasons cited below, I reach an opposite result.

I begin by summarizing DuCharme’s employment history at the Marquette plant. Unlike Mabb, DuCharme was no newcomer, and unlike Mabb, who had no appreciable skills, DuCharme knew welding and mechanical and electrical maintenance. Thus, DuCharme started at the plant in January 1985 as a welder and was transferred to the service department in June 1985, where he worked continuously in various maintenance positions until he was laid off in August 1986. Only 3 months later, in November 1986, he was recalled as a welder, and then did electrical and mechanical maintenance in a variety of departments for another 23 months, until he was laid off in October 1988. Three weeks later, however, in early November 1988, he was again recalled, to a maintenance position, and he again worked continuously for about another 20 months, until being laid off in August 1990. He was again recalled in November 1991, and worked for 3 weeks as a welder on the baghouse crew, but then transferred in early December 1991 to a maintenance position, where he worked continuously until his May 29 layoff. As I have already found, unlike Mabb, Denning had presented DuCharme with a termination report declaring him to be eligible for re-

<sup>60</sup> If, indeed, Prindle had told Mabb that he could only visit with employees on their “break time,” this would contradict Mabb’s initial claim that he was banned from “the property.” And if Prindle did not tell Mabb that he was banned from the property, then how, exactly, might Prindle have interjected a reference to Mabb’s “union involve[ment]?”

<sup>61</sup> E.g., *American Postal Workers*, 278 NLRB 751, 752–753 (1986).

<sup>62</sup> E.g., *Silver State Disposal Co.*, 271 NLRB 486, 491 (1984). But compare, e.g., *American Postal Workers*, supra at 753, citing *Albritton Communications*, 271 NLRB 201, 204 (“suspicious coincidence” between layoffs and union organizing campaign insufficient to show employer’s unlawful motive), *enfd.* 766 F.2d 812, 821–822 (3d Cir. 1985).

<sup>63</sup> E.g., *Dr. Frederic Davidowitz*, 277 NLRB 1046, 1049 (1985). See also *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

call “without reservation.” Moreover, unlike Mabb, Denning admittedly gave DuCharme no hint at the time of his layoff that he would not be recalled in the future, and it was not until after the election that the Respondent first announced the “position” that Mabb was “ineligible for recall.”

The first question to be resolved is whether the General Counsel made out a prima facie case that DuCharme’s prounion role was a motivating factor in the Respondent’s decision to declare him ineligible for recall. And critical to this issue is the question, When did the Respondent make this decision? Denning now claims that he had already decided when he laid off DuCharme on May 29 that he would not be called back; indeed he now claims that he had arrived at this decision in “February.” Although it involves a certain leapfrogging over other evidence introduced by the Respondent against DuCharme, I will focus first on what Denning said concerning the supposed “February” decision, for obviously, if I were to believe that the decision not to recall DuCharme was made at this early date, then I would be required to conclude that the decision did not implicate the Act, for the decision would have been made at a time when there is no evidence that the Respondent knew of DuCharme’s prounion role.<sup>64</sup>

Denning testified that in February, he learned from General Foreman Thornton and from employee John Gillitzer that DuCharme had gruffly refused Gillitzer’s request to repair a defective clamp, used in hoisting sheet steel. (Gillitzer testified that DuCharme waved him away with a remark to the effect, “I don’t work on that junk.” And DuCharme, although not recalling the incident, candidly conceded that this sounded like something he might have said.<sup>65</sup>) Denning claims that he then went to Plant Manager Conrad Baughman (Denning’s own superior) and “relayed what had happened, and gave [Baughman] my recommendation that Dewey [DuCharme’s nickname] should not be recalled next time.” Asked by the Respondent’s counsel whether Baughman had

“any comment,” Denning replied, seemingly evading the question, that “Conrad didn’t disagree.”

Denning was at his least believable from a demeanor standpoint when he presented this testimony. Independently, I could not believe him on this point for the following reasons: First, his claim of a pre-May 29 decision not to recall DuCharme in the future is inconsistent with the Respondent’s answer to the complaint. Thus, as I have already noted in the Statement of the Case, in answering the complaint as to DuCharme, the Respondent averred that DuCharme was laid off on May 29, and that the Respondent “subsequently determined that he was not eligible for recall.” Second, Denning’s own testimony on the point is internally inconsistent. Thus, discussing his decision not to recall Mabb, Denning first unguardedly admitted that, “He [Mabb] is the only one I thought of at the time of layoff.”<sup>66</sup> Third, the Respondent did not call Baughman to testify about the supposed “February determination.” Fourth, Denning’s claim of an advance “determination” not to recall DuCharme is extremely difficult to square with other known facts and with the balance of his testimonial descriptions of layoff and recall practices. In this latter regard, three facts are particularly significant: (1) Denning wrote on DuCharme’s termination report that he was eligible for recall “without reservation.” (2) Denning admittedly did not *normally* make “no-recall” decisions at the time of layoff, much less more than 4 months *before* a layoff, but preferred to wait and see what future plant needs might be before deciding whether a particular worker might be recalled.<sup>67</sup> (3) Denning admitted more generally that he did not begin formulating “positions” concerning the eligibility for recall of the laid-off workers (save Mabb) until after the election, and it was not until that point that the Respondent made an affirmative, public declaration that DuCharme would not be recalled.

With the latter point foremost in mind, and rejecting Denning’s claim of a pre-May 29 “determination” not to recall DuCharme, I find that no “determination” was made by the Respondent not to recall DuCharme until *after* the election, by which point DuCharme’s prounion role was admittedly known to Denning. Moreover, by that point, the Respondent had likewise declared, unlawfully as I have found, that Teynor was “disqualified” from recall. This set of findings (specific company “knowledge” of DuCharme’s prounion position when the decision to discharge him was made, linked to antiunion “animus” revealed in the discharge of Teynor) establishes the key elements of a plausible prima facie case that DuCharme’s union sympathies were a

<sup>64</sup> More specifically, if the decision had actually been made in February, the decision would clearly not have implicated the Act because the Union did not even appear until late April. And even if the decision was not made until nearer to the point when DuCharme was laid off on May 29, the decision still would not create an inference of unlawful discrimination where there is no substantial evidence that the Company knew of DuCharme’s prounion position as early as May 29. (The only evidence of prelayoff knowledge comes from General Foreman Thornton’s vague admission that he had heard “just rumors” of union activity on DuCharme’s part “before” his layoff.) In any case, I will find that no decision was made not to recall DuCharme until after the election, at which point DuCharme’s prounion stance was well known to company supervisors and to Denning, based on DuCharme’s participation in plant-gate electioneering, including holding the Union’s flag.

<sup>65</sup> DuCharme further explained that during this period, he was working as a roving maintenance man and was confronted daily with many conflicting demands on his time. He speculated that if he had done what Gillitzer described, it was probably because the clamp needed new parts, which only the toolroom attendant could provide. Gillitzer tends to confirm this latter; he recalled that the problem with the clamp was that it was missing a locking bolt, and that someone had jury-rigged a temporary “fix” by using a cotter pin to lock the clamp. And after being rebuffed by DuCharme, Gillitzer agrees that he went to the toolroom, where an attendant fixed the clamp with a new bolt from his supply of stores.

<sup>66</sup> Tr. 328:4–5. Moments later, however, Denning waffled on this, now claiming, “Well, the determination on DuCharme had been made prior to layoff.” And moments later, Denning added yet a third name—Sather—to the list of persons he had supposedly decided “at the time of layoff” not to recall in the future. I was unpersuaded by these latter emendations, uttered uncomfortably by Denning, using the bureaucratic passive voice (“a determination was made”). I think his first statement, that Mabb was “the only one I thought of at the time,” was his most candid and revealing one. It is also the one that fits most closely with the Respondent’s answer (that DuCharme’s ineligibility for recall was “subsequently determined”).

<sup>67</sup> Indeed, as I discuss elsewhere below, Denning emphasized the same point in explaining why he rebuffed General Foremen Glassmaker’s and Thornton’s recommendations in previous years not to recall DuCharme.

motivating factor in the Respondent's decision to discharge him. It therefore fell to the Respondent to "demonstrate" that it would have decided not to recall DuCharme even if he had never become involved with the Union's representational effort. For the reasons I discuss next, I judge that the Respondent failed to make such a demonstration; indeed, I judge that in the process of trying to make that demonstration, the Respondent merely tended to reinforce the *prima facie* indications that DuCharme was the victim of unlawful discrimination.

The Respondent sought to meet its *Wright Line* burden primarily through testimony from Denning and from General Foreman Glassmaker and Thornton. In substance, these witnesses related a longstanding history of difficulties with DuCharme, mostly that he was irascible, uncooperative, or slow to respond to supervisory direction and tended to have a know-it-all attitude, making him generally unpopular with his fellow workers and with his immediate "working foremen." To the extent this testimony addressed DuCharme's work history in years prior to his final stint at the plant (i.e., prior to the period November 1991 through May 29, 1992) it was entirely generalized in tone and not illustrated with any specific examples. In any case, in attempting to depict DuCharme as a chronically undesirable employee, the Respondent proved too much. Thus, Denning, to some extent echoed by Glassmaker and Thornton, testified that when DuCharme was laid off in 1990 and 1991, the general foremen had indicated that they did not want DuCharme recalled in the next peak seasons, yet Denning admittedly *rebuffed* these suggestions in those years, telling those supervisors, in substance, that such decisions were not normally made at the time of layoff. And significantly, despite this background of opposition by the general foremen to the recalling of DuCharme, Denning nevertheless found reason—after each of those layoffs—to recall DuCharme to work. Moreover, considering the Respondent's attempts to show that DuCharme had always been a "problem" worker, I find it striking that only one of DuCharme's performance appraisals (spring 1990) was introduced by the Respondent, and it is generally quite favorable to DuCharme, and nowhere damning.<sup>68</sup> In addition, there is not a shred of evidence that any of DuCharme's supervisors ever remonstrated or counseled with DuCharme over these supposedly chronic shortcomings.<sup>69</sup>

<sup>68</sup> The only appraisal on DuCharme introduced by the Respondent (R. Exh. 8) was signed by General Foreman Glassmaker on February 26, 1990, and countersigned by Plant Manager Baughman on March 8, 1990. It reveals that DuCharme got top ratings (a "1") in "Quality" and "Job Knowledge," and superior ratings ("2") in "Dependability" and "Adaptability," and mediocre ratings ("3") in the areas of "Quantity" and "Cooperation." (In the latter two cases, "3" denoted, respectively, "Competent worker—Accomplishes satisfactory amount of work," and "Generally Cooperative in Regular Duties—Conservative in Dealing With Others—Generally Considers Suggestions.")

<sup>69</sup> The Respondent would apparently seek to explain its historical failure to document these supposedly chronic problems with DuCharme—or even to counsel with him about them—in terms of its much-touted "non-confrontative" approach to dealing with undesirable employees. But I recall that Denning, in adopting this line of explanation, also said that, rather than thus "confronting" bad employees with their shortcomings, he would simply not recall them in the future. Obviously, however, DuCharme was recalled year after

The only conclusion I can draw from all of this is that Denning had long ago judged that, for all of his perceived faults, DuCharme was, on balance, an asset to the Company's operation. At least this was Denning's admitted judgment when he recalled DuCharme to work in November 1991. And in the end, dispute Denning's claims to the contrary, it seems equally to have been Denning's judgment as late as May 29 that DuCharme was still an asset to the company, for on that date, Denning wrote on DuCharme's termination report that he was "recommended" for recall "without reservation." And it was not until after the election, as I have found, when DuCharme had surfaced publicly as a Union adherent, that Denning saw fit to reverse this "recommendation."

This latter fact speaks louder than any others in my judgment. However, I have not yet addressed certain evidence introduced by the Respondent intended to show that DuCharme became even more of a "problem" during his final stint of employment. I will deal with this evidence only summarily, because again, I think, it proves too much.

Denning states that when he recalled DuCharme in November 1991, it was only because DuCharme had welding skills that might be usable, and he therefore assigned him to the baghouse crew, where he would work with other welders. However, says Denning, even this recourse proved useless when he got a report from General Foreman Thornton that others on the baghouse crew "didn't want to work with" DuCharme. Significantly, however, this report did not cause Denning to fire DuCharme; rather, Denning says that it merely caused him to authorize DuCharme's transfer back to a roving maintenance job, where, supposedly, he would be less likely to collide with fellow workers. (Thornton agrees that he brought such a summary report to Denning in December 1991,<sup>70</sup> but claims he did not ask Denning to transfer DuCharme, but rather mentioned this to Denning as an additional example of why he and Glassmaker had in previous years asked Denning not to recall DuCharme.) I note again that the Respondent offered no evidence that DuCharme was told that his transfer back to maintenance had anything to do with his alleged unpopularity with persons on the baghouse crew. And in fact, I am not persuaded that Thornton's generalized and second-hand claims about the preferences of the baghouse crew had anything to do with the transfer decision.<sup>71</sup> Seemingly, by this transfer action, Denning was once again displaying a by now characteristic pattern of tolerating

year. Therefore, I can only conclude that the Respondent's attempts now to portray DuCharme as a chronically undesirable employee were exaggerated and insincere.

<sup>70</sup> Thornton testified that people on the baghouse crew "didn't want to work with" DuCharme. He offered no specifics; nor did anyone else.

<sup>71</sup> Although it is not necessary to my ultimate conclusions, I would credit DuCharme as to the matter of his transfer from the baghouse crew. DuCharme testified with convincing clarity that when he was recalled to work in November 1991, Denning told him that he would be used as a welder "for two or three weeks, and then I could go back to my old job [i.e., maintenance] again." Similarly, DuCharme recalled that General Foreman Glassmaker came to him 2 to 3 weeks later and offered him the choice of either staying on as a welder in the baghouse or returning to maintenance work, and that he opted for the latter.

DuCharme's alleged shortcomings, apparently because he still saw DuCharme as an asset to the operation.<sup>72</sup>

The next incident cited by Denning was DuCharme's gruff treatment of Gillitzer when Gillitzer asked DuCharme to fix a broken clamp. It is clear that not even this incident caused Denning to decide to fire DuCharme, and I have already discredited Denning's claim that the incident caused him to "recommend" to Baughman that DuCharme not be recalled in future seasons. Moreover, at most, all that this incident showed is something that Denning claims he knew for years about DuCharme—that he was irascible and "difficult."

Other accusations against DuCharme came only from General Foremen Glassmaker and Thornton and from employee Hubanks. These were not specifically cited by Denning as grounds for his decision to discharge DuCharme. Glassmaker's and Thornton's charges were again suspiciously generalized in character, and when pressed for specifics, more often than not, they could cite none. In general, their testimony suggested more than anything else a clumsy, *post facto* attempt by the Respondent to dig up dirt on DuCharme. Thus, for example, Glassmaker initially attacked DuCharme for failing to perform preventative maintenance work according to a company prescribed schedule; yet Glassmaker eventually conceded that he was in no position to know whether DuCharme had regularly failed to do this. And still later, he conceded that DuCharme had, if anything, "improved some" on this score in his most recent period of employment. In an even more embarrassingly clumsy attempt to demonstrate DuCharme's failings, Hubanks was called to testify that he complained to DuCharme in "early '92" about a "kink" and some fraying in a crane cable, which, to Hubanks, seemed to be dangerous. He says that DuCharme inspected it and observed that it would take about 300 feet of replacement cable to fix the problem, and he questioned whether the Company would pay for it. This was hardly damning, however, because Hubanks soon admitted that he had likewise mentioned the same problem to his foreman, who suggested that it be brought to Denning's attention, in Denning's capacity as the plant "safety officer." And after DuCharme's, layoff, Hubanks told Denning about the kinked cable, and Denning promised to "have Randy Thornton and Kim Pickett look into it." Most significantly, however, Hubanks eventually conceded that the cable was *never* replaced nor fixed thereafter, and that it was now in even worse condition than when he had originally questioned DuCharme about it. Other specific complaints made by Thornton or Glassmaker about DuCharme can be dismissed as attempts to blame DuCharme for failing to fix certain machines which suffered from an ongoing series of problems, and which no one else in the plant knew how to fix either.<sup>73</sup>

<sup>72</sup> Company records show that this transfer occurred on December 2, 1991. It may be merely ironic that only about 3 weeks later, back in the parent corporation's headquarters in Florida, Gencor's president, E. J. Elliott, signed a fancy "Certificate of Appreciation to Walter DuCharme, in recognition to a Loyal Employee for Ten Years [sic] of Continuous [sic] Service." The certificate, dated December 20, 1991, stated further:

Your Contribution and Efforts are Greatly Appreciated. It is Employees Such as Yourself that Set the Pace for Others to Follow. Congratulations on Your Fine Achievement.

<sup>73</sup> Here I refer to attempts to suggest that DuCharme was unaggressive in fixing problems with a "do-all" saw, and a com-

press. That DuCharme's shortcomings appear to have been grossly exaggerated by the Respondent's witnesses is likewise inferable by comparing DuCharme's appraisal, *supra*, with a manifestly less favorable one given to employee Scherf in February 1992.<sup>74</sup> (Recall that Scherf, like DuCharme, was one of the laid-off employees who voted under challenge on July 16, and was one of those whom the Respondent initially contended immediately after the election was ineligible for recall because of "unacceptable work performance." However, the Respondent had withdrawn this "position" as to Scherf, only shortly thereafter—and indeed, had returned him to work on August 10—the day before the postelection hearing began.) Denning testified that the Company changed its position as to Scherf because company lawyers reviewed Scherf's personnel file and did not find enough evidence in it to justify the claim that his work performance was unacceptable. Clearly, if an analysis of performance appraisals caused the Respondent to reverse its position as to Scherf, one might have expected a similar analysis to have caused the Respondent even more quickly to have reversed its position as to DuCharme. The only obvious difference is that DuCharme was by then known to be pronoun, whereas, according to Denning, Scherf's sympathies were unknown to the Company.

I thus reject the Respondent's attempt to meet its *Wright Line* burden. I find instead that when the Respondent declared DuCharme ineligible for recall, it violated Section 8(a)(3), and derivatively, Section 8(a)(1), substantially as alleged in the complaint.

#### REMEDY

Because the Respondent unlawfully declared employees Teynor and DuCharme to be ineligible for recall while they were in layoff status, it effectively discharged them, and precluded their recall from layoff in due course. Thus my recommended order requires that the Respondent restore the status quo ante its unlawful actions by immediately reclassifying them as eligible for recall and by purging from its records any references to their unlawfully declared ineligibility for recall. In addition, my order requires that the Respondent recall them to work at such time as it would have done—and to positions they would have been assigned—but for its unlawful actions, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would otherwise have been recalled to the date of their actual recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>75</sup>

DuCharme's explanations, which are highly technical, are not worth repeating. I find, simply, that DuCharme neither ignored these machines nor did he resist suggested ways to fix them. Rather, each one of these machines, for different reasons, defied easy fixes, and required continuous experimentation, and, in the end, assistance from the manufacturer in one form or another.

<sup>74</sup> Like DuCharme, Scherf received a "3" in the area of "Cooperation." After that, however, DuCharme looks like a star compared to Scherf, who received the lowest mark ("5") when it came to "Job Knowledge," and received a "4" in all other areas.

<sup>75</sup> The date when Teynor or DuCharme would have been recalled absent the Respondent's unlawful discrimination against them, and

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>76</sup>

### ORDER

The Respondent, Bituma Corporation, Marquette, Iowa, its officers, agents, successors, and assigns, shall,

1. Cease and desist from discharging, declaring ineligible for recall, or otherwise discriminating against any employee for supporting International Association of Machinists and Aerospace Workers, AFL-CIO, or any other union, or for engaging in other activities protected by Section 7 of the Act, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reclassify Daniel Teynor and Walter DuCharme as eligible for recall, and offer them immediate and full reinstatement to the positions they would have been assigned at such time as they would have been recalled absent its unlawful discrimination against them, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to its unlawful declarations that Teynor and DuCharme were ineligible for recall, and notify them in writing that this has been done and that the previous declarations of their ineligibility for recall will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Marquette, Iowa plant copies of the attached notice marked "Appendix."<sup>77</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respond-

thus the triggering date for backpay purposes, is to be determined at the compliance stage.

<sup>76</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>77</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge you, or declare you ineligible for recall from layoff, or otherwise discriminate against any of you for supporting International Association of Machinists and Aerospace Workers, AFL-CIO, or any other union, or for engaging in other activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reclassify Daniel Teynor and Walter DuCharme as eligible for recall from layoff.

WE WILL offer Daniel Teynor and Walter DuCharme immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at such time as they would have been otherwise recalled but for our declaration in the summer of 1992 that they were ineligible for recall, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our declaring them to be ineligible for recall, less any net interim earnings, plus interest.

WE WILL notify Daniel Teynor and Walter DuCharme that we have removed from our files any reference to their being declared ineligible for recall, and that these previous declarations of ineligibility will not be used against them in any way.

BITUMA CORPORATION